A

HO CHEE KHEONG & ANOR

v.

MEGALEAP DEVELOPMENT SDN BHD & ORS

B

HIGH COURT MALAYA, SHAH ALAM
ZALEHA YUSOF JC
[CIVIL SUIT NO: MT5 (MT1)-22-848-2008]
17 JULY 2009

C

CIVIL PROCEDURE: *Judgments and orders - Ex parte order - Appointment of receivers and managers - Restraining defendants from dealing with shares of first defendant - Application to set aside - Plaintiffs acting as proxies of undischarged bankrupts - Whether an illegal arrangement - Whether there was clear contravention of Bankruptcy Act*

D

1967 and Companies Act 1965 - Whether plaintiffs true and rightful directors and shareholders of company - Whether extraordinary circumstances arose - Whether there was justification for the appointment of receivers and managers to be made ex parte - Whether ex parte order set aside

E

This was an application by the first to fifth defendants to stay or set aside the *ex parte* order appointing receivers and managers (R & M) for the first defendant and restraining the defendants from dealing with the shares of the first defendant until further

F

order. Briefly, the facts were that the first defendant was set up by one Izzudin and the fifth defendant in 2006 to go into property development. Since both of them were undischarged bankrupts, it was agreed that the plaintiffs would be the nominees and proxies for Izzudin and the fifth defendant; that the latter two

G

would be the de facto CEO and deputy CEO of the first defendant and shadow directors of the same and that Izzudin and the fifth defendant could remove the plaintiffs at any time as directors and shareholders of the first defendant. Subsequently, Izzudin fell ill and had instructed the fifth defendant to proceed

H

to replace the plaintiffs as directors of the first defendant and to transfer the shares of the first defendant from the plaintiffs to other nominees and proxies in order to safeguard their respective interests in the first defendant. The Board of Directors of the first defendant approved the transfer of the shares of the first

I

defendant from the plaintiffs to the second, third and fourth defendants. Dissatisfied, the plaintiffs commenced this action against the defendants and in order to prevent the defendants from dissipating the assets of the company or proceeds, pending

the outcome of this suit, had applied for R & M to be appointed. The application had been made in encl. (8) pursuant to O. 29 and/ O. 30 of the Rules of the High Court 1980 (RHC) and/or s. 43 of the Specific Relief Act 1950 which was granted by the court. Hence, this summons in chambers by the said defendants in encl. 12. The issues that arose were (i) whether the plaintiffs were the true and rightful directors and shareholders of the company and (ii) whether an application for the appointment of R & M under O. 30 of the Rules of the High court could be made *ex parte*.

Held (allowing the application in encl. 12 with costs):

(1) Bankruptcy Act 1967 and Companies Act 1965 prohibit an undischarged bankrupt from acting as a director or taking part in the management of any company without the permission of the Director of Insolvency or the court. In this case, Izzudin and the fifth defendant had not obtained such permission. Instead they were using the plaintiffs. Since they had appointed themselves to be the CEO and the Deputy CEO of the first defendant, their actions clearly contravened the provisions of the two laws. Following the decision of the Court of Appeal in *Thong Foo Ching & Ors*, the arrangement entered into between Izzudin, the fifth defendant and the plaintiffs could not be enforceable. As such, this went against the plaintiffs as well. The plaintiffs could not claim themselves to be the rightful directors and shareholders of the company as they had allowed themselves to act in concert and be involved in such an illegal arrangement. (para 10)

(2) The plaintiffs had not produced any evidence to show that the defendants had misused, misappropriated, removed or dissipated the assets of the first defendant. Their case was entirely based on suspicion and speculation. Hence, there was no justification for the appointment of the R & M to be made *ex parte*. The court jurisdiction to grant the *ex parte* order must be exercised very sparingly with great caution, circumspection and in the case of extreme urgency. The court must also consider public interest, in this case the interests of the purchasers in the project that was handled by the first defendant. As in the case of *United Engineers (Malaysia) Berhad*, the appointment of the R & M in this case must be made *inter partes*. As it was not, the *ex parte* order must be set aside. (paras 14 & 15)

Case(s) referred to:

In re Connolly Brothers, Limited. Wood v. Connolly Brothers, Limited [1911] 1 Ch 731 ***(refd)***

Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(foll)***

United Engineers (Malaysia) Bhd v. Seow Boon Cheng & Anor [2001] 6 CLJ 190 HC ***(refd)***

Bond Brewing Holdings Ltd and Ors v. National Australia Bank Ltd & Ors [1989-1990] 1 ACSR 445 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 38(d)
Companies Act 1965, s. 125
Contracts Act 1950, s. 24
Rules of the High Court 1980, O. 29, O. 30
Specific Relief Act 1950, s. 43

For the plaintiffs - M/s HC Tan & Zahari
For the 1st, 2nd, 4th & 5th defendants - M/s Gerard Samuel & Assocs
For the 3rd defendant - M/s Haniff Khatri; M/s Soraya Chuah & Assocs
GL (AC Devi with him) m.o.b of plaintiffs and defendants

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Yusof JC:

[1] This is an application by the 1st to 5th defendants (excluding the 3rd defendant) to stay or set aside the *ex parte* order dated 10 June 2008 appointing receivers and managers (R & M) for the 1st defendant and restraining the defendants from dealing with the shares of the 1st defendant until further order.

Facts

[2] The 1st defendant was set-up by one Izzudin bin Osman ("Izuddin") and the 5th defendant in 2006 to go into property development. The two had been business partners for more than 20 years. Since both of them were undischarged bankrupts, it was agreed that the plaintiffs would be the nominees and proxies for Izzudin and the 5th defendant; that the latter two would be the de facto CEO and Deputy CEO of the 1st defendant and shadow directors of the same; and that Izzudin and the 5th defendant could remove the plaintiffs at any time as directors and shareholders of the 1st defendant. To that end, the plaintiffs

signed undated resignation letters, blank shares transfer forms and blank board resolutions to be used by Izzudin and the 5th defendant as and when required. A

[3] Both the plaintiffs had made no contribution to the 1st defendant or made any payments on account of or towards the 1st defendant since its inception. On the contrary, the main contributors to the 1st defendant were Izzudin and the 5th defendant together with the 2nd and 4th defendants. The 2nd defendant had loaned moneys to Izzudin to be utilized to increase the paid-up capital of the 1st defendant. Similarly, the 4th defendant through another company also lent moneys to the 1st defendant in connection with its incorporation expenses. The 1st defendant is the developer of a project known as "Taman Industri Subang" in a joint venture with the project land owner one Ultramine Sdn Bhd wherein the 2nd and 4th defendants are directors. Ultramine Sdn Bhd will get 70% of the profit from the project and the 1st defendant will get 30%. The project is valued at RM34 million. B C D

[4] Around 21 January 2008, Izzudin fell ill and instructed the 5th defendant to proceed to replace the plaintiffs as directors of the 1st defendant and to transfer the shares of the 1st defendant from the plaintiffs to other nominees and proxies in order to safeguard their respective interests in the 1st defendant. The resignations of the plaintiffs as directors of the 1st defendant, the appointment of the 2nd, 3rd and 4th defendants as the new directors of the 1st defendant and the change in the signatory to the 1st defendant's bank account took place around 31 January 2008. Around 17 February 2008 Izzudin fell gravely ill from a major stroke and went into a deep coma. He is unlikely to recover as he has suffered extensive brain damage. On 31 March 2008, the board of directors of the 1st defendant approved the transfer of the shares of the 1st defendant from the plaintiffs to the 2nd, 3rd and 4th defendants. On 11 April 2008, the share transfer forms were lodged with SSM. All these facts can be seen in exhs. M1 to M6 of encl. (13). E F G H

[5] The plaintiffs, being unhappy that they were removed as directors and shareholders of the 1st defendant, commenced this action against the defendants. The plaintiffs alleged forgery on the part of the defendants and in order to prevent the defendants I

A from dissipating the assets of the company or proceeds from the project, pending the outcome of this suit, had applied for R & M to be appointed. The application was made in encl. (8) pursuant to O. 29 and / or O. 30 of the Rules of the High Court 1980 (RHC) and / or s. 43 of the Specific Relief Act 1950. This
B application was granted by the court on 10 June 2008. Hence this summons-in-chambers by the said defendants in encl. (12).

Issue 1

C *Are The Plaintiffs The True And Rightful Directors And Shareholders Of The Company?*

[6] It is not disputed that the 1st plaintiff was a former low ranking police officer and acted as a bodyguard cum assistant to Izzudin and the 2nd plaintiff was working as a driver and is a
D relative of Izzudin. Before their appointment as directors of the 1st defendant, they never had any business experience. A letter dated 7 July 2006 from Izzudin to the 5th defendant, as exhibited in encl. (13) as 'M8' is self-explanatory. The letter reads as follows:

E Date: 7/7/2006

Tak Mei Ming
No. 9, Jalan Kenyalang 11/15H
D' villa Kota Damansara
47810 Petaling Jaya
F Selangor.

Dear Mei Ming,

Re: Megaleap Development Sdn Bhd

G I refer to the above matter and our recent discussion on the purchase of Megaleap Development Sdn Bhd to be used as a vehicle for property development together with Ultramarine Sdn Bhd.

As per our discussion I have identified Ho Chee Kheong and
H Kamarul Afzuan bin Kamarudin to be our nominee directors and shareholders of the company. In view of the fact that both of us are facing several pending legal proceedings it would be best if we keep our involvement in the company out of the board.

I have told Ho and Kamarul that they will only be directors and
I shareholders "on paper" and that all decisions will be taken by me and you as CEO and Deputy CEO respectively. Therefore, I

will get the both of them to sign undated resignations letters as directors from the board and also to sign blank transfer of shares forms to be utilized by either of us in the event we need to remove Ho and Kamarul in the interests of the company. It would be best for the company secretary to hold these documents and use them when necessary on your instructions.

Since Ho and Kamarul are only our nominees, it would be best to get them to sign undated resolutions confirming their resignation from the board and also as signatories of the company's accounts to safeguard our interests. I will attend to this and forward the relevant documents to you in due course.

On another matter, as our finances are tied up at present, perhaps you could arrange from any of your sources a short - term loan to the company of around RM500,000 for us to increase the paid-up capital. Maybe we can repay this loan in 12 months and if not offer shares and a position on the board to the lender. Let me know if you have a person in mind.

Regards,

Izzudin bin Osman.

[7] The letter clearly shows that the plaintiffs were nominees. Otherwise, why did they sign the blank share transfer forms in respect of their shares in the 1st defendant? In fact the plaintiffs conceded signing such forms but for different reasons. They contend that the share transfer forms were signed in blank because at some later stage after the completion of the said project and if there was any profit, the plaintiffs would transfer some of the shares in the 1st defendant to Izzudin or his family as a reward or in recognition of Izzudin's efforts in the 1st defendant. However I find this explanation is neither probable nor plausible. Firstly, if as the plaintiffs contend Izzudin was appointed as the chief executive officer for the 1st defendant because he co-founded the company with the plaintiffs and had considerable business experience, and he even went to the extent of teaching the 2nd plaintiff about running a successful business, why were the shares not given to him then? Secondly, why was the share forms signed in blank way back in August 2006 even before the said project had commenced and even before its completion? Thirdly, were the plaintiffs so confident that the project would be a success even before its completion? And fourthly, the plaintiffs

later claimed that 55% of the shares in the 1st defendant belong to them, 25% to the 5th defendant and 20% to the family members of Izzudin. If that was the case, my question again is why sign the share transfer forms in blank?

[8] The plaintiffs denied that they were mere nominees. The learned counsel for the plaintiffs has submitted that if the plaintiffs were being used by Izzudin and the 5th defendant who are undischarged bankrupts, that means they were simply circumventing s. 38(d) of the Bankruptcy Act 1967 (Act 360) and s. 125 of the Companies Act 1965 (Act 125). The learned counsel for the plaintiffs further submits that such an arrangement is illegal and unenforceable under s. 24 of the Contracts Act 1950 as it would defeat the provision of Act 360 and Act 125.

[9] The learned counsel for the plaintiff further refers to the decision of the Court of Appeal in *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674 wherein it had held, *inter alia*, as follows:

> (Per Siti Norma Yaakob JCA) The respondent and the appellants must have been aware that their act in circumventing the guidelines had also contravened the relevant provisions of the Real Property Gains Tax Act 1976 and the Stamp Act 1949. Section 66 of the Contracts Act 1950 did not apply here and as such, restitution could not be ordered (see p 603G-I); *Ahmad bin Udoh & Anor v. Ng Aik Chong* [1970] 1 MLJ 82 and *Yeep Mooi v. Chu Chin Chua & Ors* [1981] 1 MLJ 14 distinguished.
>
> (Per Ahmad Fairuz JCA) The respondent was aware that both the agreements were actions to avoid paying higher taxes which should have been paid to the government. The respondent's action was clearly contrary to public policy. The consideration in the agreements were unlawful and as such, the agreements were void and unenforceable. What the parties did had the effect of defeating revenue laws and the court cannot knowingly enforce a void agreement (see pp 606F-I and 607A-B).

[10] Both Act 360 and Act 125 prohibit an undischarged bankrupt from acting as a director or taking part in the management of any company without the permission of the director of insolvency or the court. In other words, it is not a total prohibition, he can still act if he has obtained the permission. In this case, Izzudin and the 5th defendant had not obtained such permission. Instead they were using the plaintiffs. It would still be

in order if they were not involved in the management of the company. But since they had appointed themselves to be the Chief Executive Officer (CEO) and the Deputy CEO of the 1st defendant as shown in exh. 'M8', their action in my opinion clearly contravenes the provisions of the two laws. Following the decision of the Court of Appeal in the case of *Thong Foo Ching & Ors (supra)*, I hold that the arrangement entered into between Izzudin, the 5th defendant and the plaintiffs cannot be enforceable. As such, this would go against the plaintiffs as well. The effect would be, the plaintiffs cannot claim themselves to be the rightful directors and shareholders of the company as they had allowed themselves to act in concert and be involved in such an illegal arrangement.

Issue 2

Whether An Application For The Appointment Of R & M Under O. 30 Of The RHC Can Be Made Ex Parte

[11] The order of the court dated 10 June 2008 appointing the R & M was made *ex parte*. The learned counsel for the defendants argues that the court should not appoint an R & M *ex parte* without adequate notice to the defendants. He quotes the case of *In re Connolly Brothers, Limited. Wood v. Connolly Brothers, Limited* [1911] 1 Ch 731, CA where it was held, except under extraordinary circumstances, the court ought not to appoint a receiver *ex parte*.

[12] I found this issue had been dealt with in great detail by Ghazali J (as he then was) in *United Engineers (Malaysia) Bhd v. Seow Boon Cheng & Anor* [2001] 6 CLJ 190. The case made reference to the decision of the Supreme Court of Victoria in the case of *Bond Brewing Holdings Ltd and Ors v. National Australia Bank Ltd & Ors* [1989-1990] 1 ACSR 445 where the said Supreme Court stated that applications "for the appointment of a receiver made without any, or any, adequate, notice to the defendant, like applications for an interim injunction made in similar circumstances, are, or should be, granted sparingly. ... To return to the present case, the order was sought without effective notice to the defendants, who thus had no opportunity of putting forward evidence or argument or of offering undertakings." The learned Ghazali J (as he then was) also stated as follows:

The learned Judges then went on to state that since the order was sought without any effective notice to the defendants, who thus had no opportunity of putting forward evidence argument or of offering undertakings, under those circumstances it was necessary for the applicant to show he has a most powerful case of apprehended injury. The learned Judges were of the view that *ex parte* applications for the appointment of a receiver ought not to be granted except in a case of emergency. The applicant must show that the circumstances are extraordinary and the court must determine whether a sufficient case of emergency has been shown to warrant the particular order sought.

[13] The learned judge later held, *inter alia*, as follows:

> 1.(a) An application for the appointment of a receiver under Order 30 r. 1 of the RHC must be made *inter partes*. Order 30 r. 1 does provide that the court may grant an interim injunction on an *ex parte* application to restrain the party beneficially entitled to any interest in the property of which a receiver is sought, from assigning, charging or otherwise dealing with that property prior to the hearing of a summons for the appointment of the receiver. However, for the appointment itself, the application must be made *inter partes*. On this basis alone, the said *ex parte* order should be set aside.

[14] So, coming back to the instant case, the question now is, what is the extraordinary circumstances here? I find it to be none. The plaintiffs had not produced any evidence to show that the defendants have misused, misappropriated, removed or dissipated the assets of the 1st defendant. To my mind, their case was entirely based on suspicion and speculation. The plaintiffs conceded that the 1st defendant had received progress payments from the end-financiers for Stages 1 and 2 of the said project in 2007. This was when the plaintiffs were directors and shareholders of the 1st defendant. The plaintiffs expected the 1st defendant to receive the progress payments in respect of Stages 3 and 4 between January and June 2008 but they were not certain if these payments had been received by the 1st defendant when encl. 8 was filed. Therefore, there is no evidence of the defendants having misused or misappropriated the progress payments for Stages 3 and 4 of the said project. According to the defendants, the progress payments have to be used by the 1st defendant to pay its contractors, suppliers and public utilities. Without these

payments, the said project would come to a halt and that would be detrimental to the end purchasers of the said factory lots. The plaintiffs also accused the defendants of misappropriating RM1.5 from the 1st defendant's bank account. The defendants in para. 38 of encl. 21 and para. 31 of encl. 27 at exh. "NCH14" explained that the sum of RM1.5 million was paid to the Inland Revenue Board Malaysia to settle the income tax of Ultramarine Sdn Bhd and it was made at the request of Ultramine Sdn Bhd and will be deducted from the profit of the said project that is due to Ultramarine Sdn Bhd. Therefore, I find there is no truth in the plaintiffs' allegations that the defendants had misappropriated the said sum of RM1.5m.

[15] On those reasons I find there was no justification for the appointment of the R & M to be made *ex parte*. The court jurisdiction to grant the *ex parte* order must be exercised very sparingly with great caution, circumspection and in the case of extreme urgency. The court must also consider the public interest, in this case the interests of the purchasers in the said project. As in the case of *United Engineers (Malaysia) Berhad (supra)*, I conclude that the appointment of the R & M in this case must be made *inter partes*. As it was not, the *ex parte* order must be set aside.

[16] Hence, I allow the application in encl. (12) with costs.